Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO C–02–247 OF 2002

MOHD NOOR AHMAD, RICHARD MALANJUM AND MOHD GHAZALI JJCA

6 NOVEMBER 2003

Civil Procedure — Injunction — Ex parte injunction — Application to discharge injunction — Duty to make full and frank disclosure when making ex parte application for injunction — Whether complied with — Failure to state agreement between parties terminated — Whether alleged termination of agreement relevant in application for ex parte injunction — Consequences of such non-disclosure — Rules of the High Court 1980 O 29 r 1(2A)

Civil Procedure — Injunction — Interlocutory injunction — Agreement to sell — Agreement terminated — Injunction by buyer to restrain seller from entering into premises — Whether entry by owner was lawful without first obtaining a court order — Whether party's rights had been infringed — Whether status quo before such forcible entry ought to be preserved — Whether applicable to parties other than landlord and tenant — Specific Relief Act 1950 ss 7(2) and 8

The respondent was a co-operative society. The respondent as sellers entered into an agreement with the appellants as buyers in connection with the sale of a palm oil mill factory and certain the estate lands ('the properties'). While the agreement was dated on 20 November 1998, it was agreed that they would take effect from 1 January 1998. When the respondent re-asserted its ownership of and right of possession to the properties, maintaining that it never gave the properties up to the appellants under the agreement, the appellants obtained an ex parte injunction to restrain the respondent from trespassing onto the properties. Subsequently, by consent, an interim injunction was granted pending the disposal of the inter partes application for an injunction ('encl 12'). The appellants maintained that they had been in possession since January 1998 and that such possession had been lawfully obtained. The respondent argued that the agreement did not provide for the appellants to take possession. The appellants sought to rely on s 7 of the Specific Relief Act 1950 ('the Act') to substantiate their contention and urged the court not to confine its application to tenancies only. In dismissing encl 12 the trial judge ruled, inter alia, that: (i) the balance of convenience favoured the respondent; (ii) damages would be an adequate remedy for the appellants; (iii) the status quo before the agreement should be maintained; and (iv) that there had been material non-disclosure of relevant facts by the appellant during the ex parte application. The appellants appealed. The appellants submitted that damages alone would not be an adequate remedy. The trial judge erred in holding, merely because there was a prayer for damages in the claim, that it could be assumed damages would be adequate compensation. The appellants also argued that the trial judge erred on the issue of maintaining the status quo. On the question of material non-disclosure of relevant facts,

the appellants argued that the agreement, their compliance with the terms and their termination were independent of the action of the appellants for trespass and inducement to breach of contract. Thus the issue of the agreement was irrelevant and it was wrong for the trial judge to rule that such failure was fatal to their case. Upon the dismissal of encl 12 the parties were at variance as to the status of the properties. The appellants sought and obtained an Erinford injunction pending the disposal of their appeal to the Court of Appeal. The respondent appealed against the grant of the Erinford injunction.

Held, dismissing the appellant's appeal and setting aside the Erinford injunction:

(1) The issue of possession should be considered vis-a-vis ownership of the properties. The appellants had adduced no evidence to show that they had come into possession of the properties pursuant to an arrangement with the respondent. There was no assertion by the appellants that they were the legal or beneficial owners of the properties (see para 12); *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 referred.

(2) There being no dispute that the properties belonged to the respondent, there was nothing unlawful in the respondent, as the owner of the properties, regaining possession of the same. Bearing in mind that there was nothing to indicate the manner in which the appellants gained possession, if there was a trespasser, it would appear to be the appellants (see para 14); *Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Ranee & Country Club Sdn Bhd* [2000] 4 MLJ 737 referred.

(3) The Court of Appeal was not convinced that s 7 of the Act should be applied in this case. There was nothing to show that the appellants had come into possession of the properties on the basis of any documentary evidence, let alone as a licensee (see para 18).

(4) The balance of convenience correctly favoured the respondent. The justice of the case did not lie in allowing the appellants to be in possession of the properties belonging to the respondent. This would amount to allowing the appellants to deprive the lawful owner of his properties. The appellants had failed to show how they came to possession of property undisputedly belonging to the respondent. The contention that it would be more convenient to allow the appellants to continue to control the properties had no merit (see paras 20–21).

(5) No evidence was adduced to the effect that there would be a breach of the peace if the respondent was allowed to go on self-help. There was no denying that the respondent had been in possession of the properties before the grant of the Erinford injunction (see para 22).

(6) The fact that the necessary approvals from the relevant authorities such as the Co-operative Development Committee and Foreign Investment Commission were not secured was another matter that should be taken into account. Surely the absence of such approvals

would make the continuation of the agreement impossible. This was another factor weighing against the grant of the interim injunction sought (see para 23).

(7) This was not a case where the losses of the appellants, if they were to succeed in an action for trespass and inducement to breach contract, could not be quantified in term of monetary sums. In any event, with the appellants failing to adduce evidence as to their right to be in possession of the properties, the issue of trespass by the owner should not arise (see paras 26–27).

(8) The question of maintaining the status quo did not arise and the finding of the trial judge on the issue was quite irrelevant. However, the trial judge was not completely wrong when he came to such finding. After all the appellants had failed to show how they came into possession of the properties (see para 30).

(9) It is trite law that in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. The cause of action for trespass pre-supposed that the appellants were lawfully in possession of the properties to the exclusion of others. Taking such a stand would amount to ignoring the true position of the genesis of the relationship of the parties. Indeed the fact that the agreement had been terminated, validly or otherwise, was obvious to be one of the defences that could be raised by the respondent in response to an action for trespass. Further, O 29 r 1(2A) of the Rules of the High Court 1980 mandates such a requirement (see paras 32–33); *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Law Rep 428 and *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527 referred.

(10) The relevance of the Erinford injunction as an issue depended on the finding on the application for the inter partes injunction. It would make no sense to consider the Erinford injunction when the appellants were not in possession of the properties. In view of the conclusion on the inter partes issue, it was plainly academic to consider the issue of an Erinford injunction for the purpose of this appeal. With the dismissal of this appeal the Erinford injunction issued by the trial court was ipso facto set aside (see paras 2, 19).

[Bahasa Malaysia Summary

Responden merupakan sebuah koperasi. Responden sebagai penjual telah memasuki suatu perjanjian dengan perayu sebagai pembeli berkaitan kilang kelapa sawit dan hartanah ladang ('harta tersebut'). Walaupun perjanjian ini bertarikh 20 November 1998, adalah dipersetujui bahawa ianya berkuatkuasa sejak 1 Januari 1998. Apabila responden telah menegaskan haknya sebagai tuanpunya dan pemilik harta tersebut, mendakwa ia tidak pernah menyerahkan harta tersebut kepada perayu dibawah perjanjian tersebut, perayu memperolehi suatu injunksi ex parte menahan responden dari mencerobohi harta tersebut. Selanjutnya, di atas persetujuan, suatu

injunksi interim telah diberikan sehingga penyelesaian permohonan injunksi secara inter partes ('lampiran 12'). Perayu mendakwa mereka memiliki harta tersebut sejak Januari 1998 dan pemilikan itu telah diperolehi secara sah. Responden berhujah bahawa perjanjian tersebut tidak memperuntukkan perayu memiliki harta tersebut. Perayu cuba bergantung kepada s 7 Akta Pelaksanaan Spesifik 1950 ('Akta itu') bagi membuktikan hujah mereka dan mendesak agar mahkamah tidak menghadkan aplikasi seksyen itu kepada penyewa sahaja. Dalam menolak lampiran 12, hakim perbicaraan mendapati, antara lain, bahawa: (i) keseimbangan kesenangan memihak responden; (ii) ganti rugi adalah remedi yang mencukupi bagi perayu; (iii) status quo sebelum perjanjian itu harus dikekalkan; dan (iv) terdapat kegagalan pendedahan wajar fakta yang relevan oleh perayu semasa permohonan ex parte itu. Perayu telah merayu. Perayu berhujah bahawa ganti rugi semata-mata bukannya suatu remedi yang mencukupi. Hakim perbicaraan tersilap mendapati bahawa, semata-mata kerana wujudnya suatu permohonan bagi ganti rugi dalam tuntutannya, maka dapat diandaikan bahawa ganti rugi merupakan pampasan yang mencukupi. Perayu juga berhujah bahawa hakim perbicaraan tersilap dalam isu mengekalkan status quo. Pada persoalan kegagalan pendedahan wajar fakta yang relevan, perayu berhujah bahawa perjanjian itu, pematuhan mereka dengan termanya dan pembatalannya tiada berkaitan dengan tindakan perayu bagai pencerobohan dan pendorongan memecah kontrak. Maka isu perjanjian itu adalah tidak relevan dan tidak wajar hakim perbicaraan mendapati kegagalan mereka itu mengakibatkan kegagalan kes mereka. Setelah lampiran 12 ditolak pihak-pihak tidak mempersetujui kedudukan harta tersebut. Perayu memohon dan memiliki suatu injunksi Erinford sehingga penyelesaian rayuan mereka ke Mahkamah Rayuan. Responden merayu pemberian injunksi Erinford itu.

Diputuskan, menolak rayuan perayu dan mengenepikan injunksi *Erinford* itu:

(1) Isu pemilikan harus ditimbangkan vis-a-vis keempunyaan harta tersebut. Perayu tidak mengemukakan sebarang keterangan bagi menunjukkan bagaimana mereka memperolehi pemilikan harta tersebut berlanjutan persetujuan dengan responden. Tiada sebarang tuduhan perayu bahawa mereka adalah tuan punya harta tersebut (lihat perenggan 12); *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 dirujuk.

(2) Memandangkan ketiadaan sebarang pertikaian bahawa harta tersebut kepunyaan responden, sememangnya wajar responden, sebagai tuanpunya harta tersebut, memperoleh milikan harta itu. Dengan ketiadaan sebarang penjelasan mengenai cara perayu memperoleh milikan harta tersebut, sekiranya terdapat sebarang pencerobohan, maka penceroboh itu adalah perayu sendiri (lihat perenggan 14); *Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Ranee & Country Club Sdn Bhd* [2000] 4 MLJ 737 dirujuk.

(3) Mahkamah Rayuan tidak yakin seksyen Akta itu harus diapplikasikan dalam kes ini memandangkan tiada sebarang penjelasan perayu memperoleh milikan harta tersebut berasaskan sebarang keterangan dokumentar, apatah lagi sebagai pemegang lesen diberikan (lihat perenggan 18).

(4) Keseimbangan kesenangan sememangnya memihak responden. Keadilan kes tidak membenarkan perayu memiliki harta tersebut kepunyaan responden. Ini setara dengan membenarkan perayu merampas harta tuanpunya yang sah. Perayu gagal menunjukkan bagaimana mereka memiliki harta yang tidak dinafikan kepunyaan responden. Hujah bahawa lebih munasabah membenarkan perayu terus mengawal harta tersebut tidak bermerit (lihat perenggan-perenggan 20–21).

(5) Tiada sebarang keterang diberikan bagi menunjukkan bahawa kacau-bilau akan kacau-bilau akan kacau-bilau akan berlaku sekiranya responden dibenarkan menggunakan usaha sendirinya. Tidak dipertikaikan bahawa responden memiliki harta tersebut sebelum pemberian injunksi Erinford itu (lihat perenggan 22).

(6) Fakta bahawa kelulusan yang wajar dari agensi seperti Jawatankuasa Pembangunan Koperasi and Jawatankuasa Pelaburan Asing tidak diperolehi adalah satu lagi perkara yang harus dipertimbangkan. Sememangnya ketiadaan kelulusan itu akan menghampakan penerusan perjanjian. Ini adalah satu lagi faktor mengapa injunksi interim yang dipohon tidak harus diberikan (lihat perenggan**).

(7) Ini bukan suatu kes di mana kerugian perayu, sekiranya perayu berjaya dalam tindakan mereka bagi pencerobohan dan pendorongan memecah kontrak, tidak dapat diukur secara kewangan. Memandangkan yang perayu gagal memberikan sebarang keterangan hak mereka memiliki harta tersebut, persoalan pencerobohan oleh tuan punya timbul diberikan (lihat perenggan-perenggan 26–27).

(8) Persoalan mengekalkan status quo tidak wujud dan pendirian hakim perbicaraan pada isu ini tidak relevan. Walau bagaimanapun, hakim perbicaraan tidak tersilap dalam pendiriannya memandangkan yang perayu gagal menunjukkan bagaimana mereka memperolehi milikan harta tersebut (lihat perenggan 30).

(9) Adalah kebiasaan bahawa pendedahan wajar fakta yang relevan merupakan asas sebarang permohonan ex parte. Harusnya terdapat pendedahan jujur dan adil segala fakta relevan termasuk perkara yang tidak memihak pemohon. Kausa tindakan bagi pencerobohan membuat andaian perayu memiliki harta tersebut secara sah menyisihkan yang lain. Mengambil pendirian seperti itu tidak mengendahkan pendirian sebenarnya kewujudan hubungan antara pihak-pihak. Sememangnya fakta bahawa perjanjian itu telah dibatalkan, secara sah atau sebaliknya, ternyata salah suatu pembelaan yang dapat diwujudkan responden sebagai balasan tindakan bagi pencerobohan. Seterusnya A 29 k 1(2A) Kaedah Mahkamah Tinggi 1980 memandatkan keperluan ini (lihat

perenggan-perenggan 32–33); *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 dan *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527 dirujuk.

(10) Kerelevanan injunksi Erinford sebagai suatu isu tertakluk kepada pendapat ke atas permohonan bagi injunksi inter partes. Tidaklah masuk akal menimbangkan injunksi Erinford sekiranya perayu tidak memiliki harta tersebut. Memandangkan kesimpulan isu inter partes itu, jelas isu injunksi Erinford adalah akademik semata-mata dalam rayuan ini. Dengan penolakan rayuan ini injunksi Erinford yang dikeluarkan mahkamah perbicaraan secara ipso facto diketepikan (lihat perenggan-perenggan 2,19).]

Notes

For cases on ex parte injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2507–2543.

For cases on interlocutory injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Range & Country Club Sdn Bhd [2002] 4 MLJ 737 (refd)

Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd [2002] 3 MLJ 529 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1993] 3 MLJ 527 (refd)

Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Law Rep 428 (refd)

Legislation referred to

Co-Operative Societies Act 1993

Specific Relief Act 1950 ss 7, 8

Appeal from: Civil Suit No 22–29 of 2001 (High Court, Temerloh)

M David Morais (Jacob Goldie with him) (Zaid Ibrahim & Co) for the appellant.

Dato' Muhamed Ariff Mahindar bin Abdullah (Sahadin bin Mohd Taib with him) (Sahadin & Co) for the respondent.

Richard Malanjum JCA (delivering judgment of the court):

Introduction

[1] On 12 May 2003, we dismissed with costs the appeal by the appellants against the decision of the High Court in Temerloh on 2 April 2002 refusing to grant an interim injunction as prayed for in encl 12 thereof.

[2] And with the dismissal of the appeal the Erinford order issued by the same High Court to the appellants on 26 April 2002 was therefore ipso facto set aside.

[3] Dissatisfied with our decision the appellants have now applied for leave to appeal to the Federal Court. We now give our reasons for dismissing the appeal.

Background

[4] The following are not in dispute:

(a) that the respondent is a co-operative society registered under the Co-Operative Societies Act 1993;

(b) that there were three agreements executed by the respondent as the seller with the respective appellants as buyers in connection with the sale of the palm oil mill factory and the estate lands ('the properties');

(c) that all the agreements were dated on 20 November 1998 but was agreed to be effective from 1 January 1998;

(d) that it was pursuant to its corporatization exercise that the respondent executed the agreements with the view of listing with the Kuala Lumpur Stock Exchange the shares of the companies involved;

(e) that on 26 September 2001, the appellants obtained an ex parte injunction to restrain the respondent from trespassing onto the properties; such move was taken due to the action of the respondent asserting its ownership and possession of the properties which it maintained were never given to the appellants under the agreements; subsequently, by consent on 15 October 2001 an interim injunction was granted pending the disposal of encl 12;

(f) that the inter partes application for injunction (encl 12) was heard and subsequently dismissed on 2 April 2002; the appellants appealed against that dismissal;

(g) that upon the dismissal the appellants and the respondent were at variance with regards to the status of the properties which led

(h) the appellants to seek for an Erinford injunction and which was granted on 26 April 2002 pending the disposal of their appeal to this court. An appeal was also filed by the respondent against the granting of the Erinford injunction.

In the High Court

[5] In dismissing the application of the appellants, the learned High Court judge, inter alia, ruled:

(i) that the application involved the exercise of discretion;

(ii) that the balance of convenience tilted in favour of the respondent;

(iii) that damages would be an adequate remedy for the appellants;

(iv) that status quo before the agreements should be maintained; and

(v) that there was material non-disclosure of relevant facts by the appellant during the ex parte application.

The appeal

[6] Before us, learned counsel for the appellants submitted:

(i) that there are serious issues to be tried such as whether the respondent can take possession of the properties summarily without order of court and whether the respondent committed the tort of inducement of breach of contract by forbidding employees of the appellants to attend managers' meeting when called;

(ii) that the balance of convenience tilts in favour of the appellants since an injunction will prevent the respondent by way of self-help from dispossessing the appellants and there are also interests of third parties to consider;

(iii) that damages are not adequate in that the injunction sought for is to prevent interference by the respondent of the possession by the appellants of the properties; moreover any interference on their possession would result in irreparable harm to their business and reputation in addition to rights of third parties being affected including their livelihood;

(iv) that there was no material non-disclosure at the ex parte application since the facts referred to by the learned judge was irrelevant to the present causes of action of the appellants;

(v) that the learned judge erred in making finding of facts instead of just identifying them;

(vi) that the learned judge erred in holding that the status quo to be maintained was not from the possession by the appellants but before the signing of the agreements; and

(vii) that the respondent proceeded on self-help contrary to the object and spirit of ss 7 and 8 of the Specific Relief Act 1950 ('the Act').

Finding

[7] The law on the grant or refusal of an interim injunction is clear. It involves the exercise of discretion. And there are judicial decisions, local and foreign, providing guidelines for courts to take into account when considering applications for injunction.

[8] In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, this court has summarized the guidelines in this way: **A**

To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

(1) he must ask himself whether the totality of the facts presented before him discloses a bonafide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry; **B** **C**

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and **D** **E** **F**

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisjy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion. (per Gopal Sri Ram at p 206). **G** **H** **I**

[9] (See also *Hotel Continental Sdn Bhd v Cheong Fatt Tze Mansion Sdn Bhd* [2002] 3 MLJ 529).

[10] Now from the undisputed facts, it is clear that the question of possession of the properties is in issue. The appellants maintained that they were in possession since January 1998 and stating that such possession was lawfully obtained.

[11] The respondent contended otherwise since the agreements did not give any permission for the appellants to take possession. And that it was in possession if not for the Erinford injunction.

[12] Having considered the opposing contentions, it is our view that the issue of possession should be considered vis-a-vis ownership of the properties. In this case, there was no evidence adduced by the appellants to show that indeed they came into possession of the properties pursuant to an arrangement with the respondent. And we noted that before us there was no assertion by the appellants that they were the legal and beneficial owner of the properties. And rightly so since if it was based on the agreements then the law on the point is clear.

[13] In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, his Lordship Edgar Joseph Jr FCJ said at pp 29–30:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.
>
> In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 3 MLJ 211, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

[14] Meanwhile, there is no dispute that the properties belong to the respondent. As such, there is nothing unlawful for the respondent being the owner of the properties to regain possession of the same. Thus, the question of it being a trespasser on its own properties should not arise. If at all there is a trespasser it would appear to be the appellants bearing in mind that there was nothing in the first place shown to indicate the manner in which they gained possession as alleged.

[15] In *Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Range & Country Club Sdn Bhd* [2000] 4 MLJ 737, quite a similar situation confronted this court in respect of interest of a registered owner as against a purchaser in an application for injunction. And this is what this court said at p 745:

Perhaps the real issue before us is the determination of the appellant's status as to its continued occupation of the land. The appellant cannot be heard to say that it derived an interest in the land following the granting of the licence to mine the land under the first agreement as on its own admission it had accepted that first agreement to be invalid and unenforceable. In this respect, the respondent had tendered a statutory declaration affirmed by a director of Jaytra on 27 February 1998, stating that when the first agreement was executed, the appellant was fully aware that Jaytra had no legal capacity to enter into the agreement but nonetheless the appellant took the risk that the first agreement may be invalidated as it wanted to obtain a sand mining licence from the relevant authority. The appellant however had not responded to this statutory declaration.

Clearly between October 1991 until the date of the third agreement on 10 June 1993, the appellant had no right to be on the land and during that period it was a trespasser. However, the appellant's right to be on the land after that is regularized by the third agreement, and the appellant can only rely on the provisions of the third agreement to support its claim that it has an equitable interest over the land.

For starters I need to point out that the appellant did not acquire any proprietary or beneficial interest over any part of the land despite the third agreement being a sale and purchase agreement and despite the appellant fulfilling its obligations by tendering the purchase price in full as no part of the land was transferred to the appellant ... (per Siti Norma Yaakob JCA (as she then was)).

[16] Accordingly, with respect we do not think the first issue raised by the appellants should merit further matured argument. Hence, on this first hurdle itself, the appeal of the appellants should fail.

[17] The appellants relied on s 7 of the Act to substantiate their contention and urged this court to give it the widest interpretation possible to cover all persons in possession of immovable properties and not to confine to tenancy.

[18] Having heard the argument advanced, we were not convinced that s 7 should be applied in this case. As stated earlier, there was nothing to show that the appellants came into possession of the properties on the basis of any documentary evidence let alone as a licensee.

[19] As for the second issue, its relevance depends on the finding on the first issue. It would make no sense to consider it when the appellants are not in possession of the properties. And in view of our conclusion on the first issue, it is now plainly academic to consider this second issue for the purpose of this appeal.

[20] On the issue of balance of convenience, in our judgment, it was correctly found to be in favour of the respondent. Justice of the case does not lie in allowing the appellants to be in possession of the properties as they belong to the respondent. To do so would tantamount to allowing the appellants to deprive the lawful owner of its properties.

[21] No doubt it was the stand of the appellants that they were in possession of the properties since 1998 until dispossessed by the respondent. However, as discussed above each party had its own version on the issue of possession. But it is clear that the appellants failed to show how

in the first place they came to possession of the properties while there was no dispute that they belong to the respondent. Thus, the contention that it would be more convenient to allow the appellants to continue control of the properties has no merit.

[22] In respect of the argument that there would be breach of the peace if the respondent was allowed to go on self-help, no evidence to that effect was adduced. In fact, there was no denial that the respondent was in possession of the properties before the granting of the Erinford injunction. This reason has no basis as well.

[23] Another matter that should be taken into account is the fact that the necessary approvals from the relevant authorities such as the Jawatankuasa Pembangunan Koperasi ('JPK') and Jawatankuasa Pelaburan Asing ('FIC') were not secured. Surely, the absence of such approvals would no longer make the continuation of the agreements possible, hence another factor to weigh against the granting of the interim injunction applied for.

[24] On the issue of adequacy of damages, it was submitted for the appellants that irreparable harm would be suffered by the appellants in term of their business and reputation due disruption of their use of the properties. In addition, there would also be irreparable harm to the livelihood of the employees of the appellants if the respondent were to take over possession of the properties.

[25] It was further contended that the learned judge erred in holding that as there was a prayer for damages in the claim it could be assumed that damages would be adequate.

[26] With respect, we are also not with the appellants on this issue. It is not a case of where losses of the appellants, if they were to succeed in this action for trespass and inducement to breach of contract, could not be quantified in term of monetary sums.

[27] In any event, with the appellants failing to adduce evidence as to their right to be in possession of the properties, the issue of trespass by the owner should not arise.

[28] We noted that learned counsel for the appellants only highlighted the alleged harms that could come about if the trespass of the respondent was not abated. No submission was made on the second cause of action in relation to this issue.

[29] There was also the complaint of learned counsel for the appellants that the learned trial judge erred on the issue of maintaining the status quo.

[30] Now, as it is our findings on the other issues, particularly that the balance of convenience tilts in favour of the respondent, the question of maintaining the status quo should no longer arise. Hence, the finding of the learned High Court judge on the issue is therefore quite irrelevant. But on the facts of this case we think the learned High Court judge was not completely wrong when he came to such finding. After all, the appellants failed to show how they came into possession of the said properties.

[31] On the issue of material non-disclosure of relevant facts at the ex parte application, it was the stand of learned counsel for the appellants that the agreements, their compliance of the terms and their termination were independent of the action of the appellants for trespass and inducement to breach of contract. Thus, the issue was irrelevant and it was therefore wrong for the learned judge to rule that such failure was fatal to the case of the appellants.

[32] With respect, we are unable to agree to such contention. The cause of action for trespass presupposed that the appellants were lawfully in possession of the properties to the exclusion of others. But to take that stand would tantamount to ignoring the true position of the genesis of the relationship of the parties. Indeed, the fact that the agreements were terminated, validly or otherwise, was obvious to be one of the defences that could be raised by the respondent in response to the action for trespass. Further, O 29 r 1(2A) of the Rules of the High Court 1980 mandates such requirement. We find therefore no merit in the contention of the appellants on this point.

[33] It is trite law that in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Law Rep 428, his Lordship Bingham J (as he then was) said this at p 437:

> Failure to make full and fair disclosure
>
> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding —whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established by authorities such as *Rex v The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v Schott Industrial Glass Ltd* (1981) FSR 289; *Wardle Fabrics Ltd v G Myristis Ltd* (1984) FSR 263; *BankMellat v Nikpour* (1985) FSR 87, The other principles have not been the subject of detailed challenge.

[34] (See also *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527 where KC Vohrah J (as he then was) made reference to the forgoing case).

[35] For the above reasons that we dismissed the appeal with costs. We also declined to accede to the oral request by the respondent for an order of possession thereafter as we were of the view that such matter should be dealt with by the High Court.

Appellant's appeal dismissed and Erinford injunction set aside.

Reported by Sivapragasam Kumaran